No. 90-609

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

REICHHOLD CHEMICALS, INC.,
Petitioner,

v.

TEAMSTERS LOCAL UNION NO. 515, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF ON BEHALF OF THE CARPET AND RUG INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY REICHHOLD CHEMICALS, INC.

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MOTION ON BEHALF OF CARPET AND RUG INSTITUTE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY REICHHOLD CHEMICALS, INC.

The Carpet and Rug Institute (CRI) hereby respectfully moves the Court for leave to file the accompanying brief as *amicus curiae* in support of the petition for writ of certiorari filed by Reichhold

Chemicals, Inc., in the above-captioned case. In support of its motion, CRI shows as follows:

1. The filing of this motion is necessary under Rule 37.2 of the Rules of this Court, because the Respondent union has refused to give its consent to the filing of this amicus brief.

2. CRI is an association of corporate members engaged in the manufacture and sale of tufted floor coverings. CRI has 158 corporate members who operate 321 manufacturing plants throughout the United States. These facilities employ approximately 48,000 persons and produce goods with an estimated annual retail value of $12 billion. In addition, CRI has 110 associate members who generally supply regular members with raw materials such as backing, yarn, and services.

3. Most of CRI's members and associate members are employers subject to the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* Some manufacturing facilities operated by CRI members have ongoing collective bargaining relationships with labor unions. Others presently operate on a nonunion basis but are always subject to the possibility of future collective bargaining relationships and to the potentiality of strikes.

4. As such, CRI's members and associate members have a real interest in the issue presented by the petition in this case, concerning the standards to be applied by the National Labor Relations Board and the federal courts in determining whether to classify a strike as an "unfair labor practice strike" or an "economic strike."

5. The classification of a strike as an unfair labor practice strike versus an economic one is often de-

terminative of the strikers' eligibility for immediate reinstatement and backpay at the conclusion of the strike. Against this background, all persons subject to the Act have an interest in seeing that the standards applied by the NLRB and the courts in making this determination be as clear and consistent as possible.

6. CRI requests leave to file this *amicus* brief to bring to the Court's attention information and arguments not raised in the petition concerning the practical consequences of the court of appeals' departure in this case from the traditional approach used by the Board and the courts in determining whether the requisite causal connection has been established between a strike and an employer's unfair labor practice to warrant classifying the strike as an unfair labor practice strike. CRI is concerned that, by shifting the focus of this inquiry away from the information that motivated the *employees* to decide to strike, and concentrating instead on what a *union representative* later claimed to have had in his mind when he recommended that the employees vote to strike, the court of appeals' decision creates a conflict in the law that, if allowed to stand, will have serious potential consequences for the administration of the National Labor Relations Act.

7. The *amicus* did not learn of the petition in time to file this motion and accompanying brief within the applicable time limit under Rule 36.1 of this Court's Rules, but has complied as nearly as possible under the circumstances with that time limit. Since no response to the *amicus* brief is required, the respondent will not be prejudiced by the granting of this motion.

For the foregoing reasons, the Carpet and Rug Institute respectfully requests that the Court grant it leave to file the accompanying brief as *amicus curiae* in support of the petition in this case.

Respectfully submitted,

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BRIEF ON BEHALF OF THE CARPET AND RUG INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The Carpet and Rug Institute respectfully submits this brief as amicus curiae, contingent upon the granting of the accompanying Motion For Leave To File. The amicus supports the petitioner in urging the Court to grant a writ of certiorari to review the

decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae in the issue raised by the petition is detailed in the accompanying Motion for Leave. As employers whose operations include both unionized and nonunion facilities throughout an important U.S. industry, the members and associate members of the amicus curiae have a vital interest in assuring that the standards applied by the National Labor Relations Board and the federal courts in determining whether to classify a strike as an "unfair labor practice strike" or an "economic strike" be as clear, consistent and objective as possible.

The standard used by the court of appeals to make that determination in this case differs materially from the standard consistently applied by the NLRB and the courts of appeals in a long line of prior cases. By focusing upon a union representative's subjective, after-the-fact assertions about his own, unstated reasons for recommending a strike to the employees, rather than upon the information that actually motivated the employees when they decided to strike, the decision below makes it virtually impossible for an employer to know at the time a strike occurs whether or not it will be classified as an unfair labor practice strike. It also makes it virtually impossible for an employer ever to refute a union's contention that there was a causal connection between an unfair labor practice and a subsequent strike.

Thus, the decision below creates a conflict in the circuits that will have important, widespread consequences for employers subject to the National Labor

Relations Act, 29 U.S.C. § 151 *et seq.*, including the employers represented by the amicus curiae.

STATEMENT OF THE CASE

The relevant facts are set forth in detail in the petition and in the decisions below. Briefly, the National Labor Relations Board, with one member dissenting, held that the "no-access" clause of a no-strike proposal presented by the employer during collective bargaining negotiations was a non-mandatory subject of bargaining, and that the employer therefore committed an unfair labor practice when it insisted on that clause to the point of impasse.[1] The Board found unanimously, however, that the employer's bargaining conduct was lawful in all other respects, and that its insistence on the no-access clause was not a cause of the strike that occurred at its plant in April 1984.

In finding that the employer's insistence on the no-access clause was not a cause of the strike, the Board focused on "the information on which the employees acted when they voted to strike." (Pet. App. A-36). Noting that there was no evidence that the employees even knew about the no-access clause, the Board "decline[d] to find that this proposal

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[1] The proposed no-access clause provided that employees who engaged in prohibited strikes during the term of the contract would be subject to discipline without recourse to the NLRB or any other tribunal. Initially, a 3-member NLRB panel found unanimously that this provision was lawful and proper. (Pet. App. A-48 to A-50). Upon reconsideration, however, a majority of the Board, with one member dissenting, reasoned that insofar as the no-access clause effected an *in futuro* waiver of access to NLRB processes, it was not a mandatory subject of bargaining. (Pet. App. A-32).

played any part in the employees' decision to strike." (*Id.*). Since the strike thus had no "causal connection" to an unfair labor practice, the Board found that it was not an unfair labor practice strike. Accordingly, the Board held, the employer acted within its rights when it hired permanent replacements for the strikers. (Pet. App. A-36 to A-37).

The court of appeals reversed the Board's determination and ruled that the strike was an unfair labor practice strike. Rejecting the Board's holding that the information on which the employees acted "is what is crucial" in making this determination (Pet. App. A-36), the court of appeals focused instead on what was in the mind of the union's chief spokesman when he recommended that the employees vote to strike. Based on the union spokesman's testimony that the no-access clause was one of his unspoken reasons for his recommendation, the court concluded that proposal had been a cause of the strike. (Pet. App. A-11 to A-14). Therefore, it held, the employer's hiring of replacements was unlawful.

REASONS FOR GRANTING THE WRIT

REVIEW BY THIS COURT IS NECESSARY TO RESOLVE A CONFLICT IN THE CIRCUITS AND CLARIFY THE LEGAL STANDARDS FOR DETERMINING WHETHER A STRIKE IS AN "UNFAIR LABOR PRACTICE STRIKE" OR AN "ECONOMIC STRIKE"—A DETERMINATION OF PIVOTAL IMPORTANCE IN THE ADMINISTRATION OF THE NATIONAL LABOR RELATIONS ACT.

Few determinations in labor law have more important practical consequences than whether a strike is to be classified as an "unfair labor practice strike" or an "economic" one. If it is an economic strike, the employer generally is free to hire permanent replacements for the strikers. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). Once that is done, even if the strikers later offer unconditionally to return to work, the employer ordinarily is obliged only to put them on a "preferential reinstatement list" from which it will recall them as positions become available. *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

If a strike is determined to be an unfair labor practice strike, however, the strikers generally are entitled to immediate reinstatement upon demand, displacing any workers hired in the interim to replace them, and the employer becomes liable for backpay commencing upon the strikers' unconditional offer to return to work. *See Mastro Plastics Corp v. NLRB*, 350 U.S. 270, 278 and n.9 (1956).

Unless a struck employer is able to assure potential replacements that they will have continuing employment after the strike is over, the employer will in many cases be unable to hire enough replacements to

keep its operations going. *See, e.g., Oversight Hearings on Practice and Operations Under the National Labor Relations Act*, Before the Subcomm. on Labor Management Relations of the House Comm. on Education and Labor, 100th Cong., 2d Sess., pp. 135-136 (March 1988). An employer's ability to survive the consequences of a strike, therefore, often hinges directly on whether the strike is classified as an unfair labor practice strike or an economic one.

Despite the pivotal importance of this determination, a struck employer generally has no way of obtaining a ruling on how a strike will be classified until long after it has had to decide whether or not to hire permanent replacements. Thus, the employer must act at its peril in taking this step. If it proceeds on the assumption that the strike is an economic one, but is later told by the NLRB or a federal appeals court that it was an unfair labor practice strike instead, the employer may face a Hobson's choice when the strike is over. If it displaces employees hired as permanent replacements in order to make way for the returning strikers, it may face liability for breach of promises made to the replacements when it recruited them. *Cf. Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). On the other hand, if the employer rejects the strikers' unconditional request for reinstatement, it may face ruinous backpay liability.

Against this background, it is imperative that the law afford all parties clear, consistent, objective standards for determining whether a strike will be classified as an economic or an unfair labor practice strike. Unfortunately, the decision of the court of appeals in this case does just the opposite; it blurs

the applicable standard on the critical issue of causation—i.e., whether there is a sufficient causal connection between an unfair labor practice and a strike to justify classifying it as an unfair labor practice strike. Indeed, the decision below specifically rejected the Board's finding that the information on which the employees acted is the "crucial" determining factor, thus creating a split between the standards applied by the NLRB and the D.C. Circuit.

The decision below also creates a split between the D.C. Circuit and other federal courts of appeals on this issue. Where, as here, a decision to strike has been made by a vote of the employees, rather than by a union official's fiat, the courts traditionally have treated the issue of causation as a question of fact turning upon the information that motivated the *employees* in their decision. *E.g., Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 821 (6th Cir. 1975) (in finding that strike was unfair labor practice strike, court focused on evidence that unfair labor practices were specifically discussed at a series of employee meetings after which decision to strike was made); *Airport Parking Management v. NLRB*, 720 F.2d 610, 614 (9th Cir. 1983) (court focused on evidence that employees discussed discharge constituting unfair labor practice "before the successful strike vote").

Under this traditional approach, causation is addressed in much the same way as many other issues of motivation that arise in labor law. It requires evidence that the employees *knew* of the existence of the conduct constituting an unfair labor practice and that they *based* their decision to strike or to continue striking, at least in part, on that conduct. *Compare*

NLRB v. Pope Maintenance Corp., 573 F.2d 898, 906 (5th Cir. 1978) (court stressed employee testimony that one of their reasons for striking was to eliminate employer's unfair labor practices), *with NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 704-707 (7th Cir. 1976) (court rejected NLRB's finding that unfair labor practices caused strike, relying instead on administrative law judge's contrary finding that credible evidence showed employees' real motivation was to gain recognition).

In this case, however, although the court of appeals purported to treat causation as an issue of fact, it materially changed the focus of the factual inquiry. Instead of looking, as precedent would dictate, at the information the *employees* had before them when they decided to strike, the court of appeals here looked at what the *union's spokesman* later claimed he had in mind when he urged the employees to strike.

Thus, the court of appeals impermissibly susbstituted its own view for the NLRB's expert view as to how the cause of a strike properly should be determined when the decision to strike has been made by employees rather than by a union official. *Cf. NLRB v. Curtin Matheson Scientific, Inc.*, 110 S.Ct. 1542, 1549 (1990). In doing so, it created a new rule of law that differs materially from the prior holdings discussed above on how causation is to be determined in such situations.

If the court of appeals' approach is accepted, it will make it virtually impossible for employers in most cases to know at the time a strike occurs whether or not it is an unfair labor practice strike. Under the court's approach, whenever any conduct

constituting an unfair labor practice is alleged to have occurred, a union representative can simply assert that it was that conduct which motivated him to recommend that the employees vote to strike. If, as the decision below indicates, nothing more than the union agent's uncorroborated assertion is required to establish causation, it will be virtually impossible in most instances for the employer to refute such a contention. In practical effect, then, the court of appeals' approach virtually eliminates the need for proof of causation in such cases.

Thus, the court of appeals' decision raises much more then just a question of the sufficiency of the record evidence to support the NLRB's factual findings. Rather, it poses a fundamental question of statutory interpretation with important consequences for the administration of the Act—i.e., whose motivation is controlling in determining whether a strike was caused or prolonged by an employer's unfair labor practice? Is it, as precedents would indicate, the motivation of the employees who voted to strike that counts? Or is it, as the decision below holds, the motivation of the union representative who recommended that they vote that way? By rejecting the Board's answer to this question and substituting its own, diametrically opposite approach, the court of appeals has created a conflict among the circuits on a fundamental point of labor law having enormous practical consequences for employers, unions and employees alike.

CONCLUSION

For the reasons discussed above, this Court should grant certiorari to resolve the conflict in the circuits and clarify the legal standards governing this important question in the administration of the National Labor Relations Act.

Respectfully submitted,

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